

**FISH AND WILDLIFE SERVICE
ENVIRONMENTAL RESPONSE AND RESTORATION**

Part 573 Response to Discharges of Oil and Releases of Hazardous Substances and NRDAR

Chapter 3 Natural Resource Damage Assessment and Restoration Activities 573 FW 3

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OVERVIEW

3.1 What is the purpose of this chapter?

A. This chapter covers activities that the U.S. Fish and Wildlife Service (Service) conducts during a Natural Resource Damage Assessment and Restoration (NRDAR) case under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Oil Pollution Act (OPA), or the Clean Water Act (CWA).

B. This chapter does not cover other Government programs that mitigate or restore natural resources impacted by manmade (e.g., planned activities) or other disasters (e.g., fire, flood).

3.2 What is the scope of this chapter? This chapter applies to all Service employees with responsibilities for conducting NRDAR activities.

3.3 What terms do you need to know to understand this chapter? See [573 FW 1, Exhibit 1](#) for a glossary of terms used in Part 573, Response to Discharges of Oil and Releases of Hazardous Substances and NRDAR.

NRDAR BASICS

3.4 What is the Service's delegated authority to conduct NRDAR activities? Through the National Contingency Plan, the President designated the Secretary of the Interior as the Federal trustee for natural resources managed or controlled by the Department of the Interior (Department). The Secretary redelegated these trustee responsibilities to the Assistant

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Secretaries, who further redelegated them to the heads of the bureaus (i.e., the Service Director). The Service Director delegated this authority to Regional Directors. See [207 DM 6](#) for more information.

3.5 What do the NRDAR authorities cover? The Service conducts NRDAR activities under CERCLA, OPA, and CWA to restore, rehabilitate, replace, or acquire the equivalent of natural resources and the natural resource services that have been injured by discharges of oil or releases of hazardous substances.

A. CERCLA is applicable to the assessment and restoration of natural resources and services that have been injured by a hazardous substance release or a mixture of hazardous substances and oil and the associated response/remediation.

B. OPA is applicable to the assessment and restoration of natural resources and services that have been injured by the discharge, or threatened discharge, of oil into navigable waters, adjoining shorelines, waters of the contiguous zone, or the exclusive economic zone of the United States and the associated response/remediation.

C. CWA is applicable to the assessment and restoration of natural resources and services that have been injured by the release of a hazardous substance or a mixture of hazardous substances and oil into navigable waters of the United States.

3.6 What are the safety and training requirements for Service NRDAR practitioners? Any employee participating in field work for NRDAR activities must follow the safety and training requirements for spill responders we describe in [573 FW 2](#), sections 2.8 and 2.9.

3.7 What are the basic procedures and sequence for conducting an NRDAR? Table 3-1 describes the general NRDAR steps and ties them to the specific regulatory phases that are in CERCLA and OPA. These steps can be conducted cooperatively with the responsible party. We describe each activity (center column) in more detail in the subsections under the table, and you can also find more information in the respective implementing regulations.

Table 3-1: NRDAR Activity Relative to CERCLA and OPA

CERCLA	General NRDAR Steps	OPA
Preassessment Phase	A. Determination of whether to pursue an NRDAR: notification, determination of jurisdiction, ephemeral data collection, determination on whether to proceed with NRDAR, emergency restoration, etc.	Preassessment Phase

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Assessment Plan Phase (may include Preliminary Estimate of Damages, Restoration and Compensation Determination Plan)	B. Assessment Plan(s) C. Injury Determination and Quantification, and Damage Determination (development of restoration alternatives, restoration scaling, and valuation)	Restoration Planning Phase: Injury Assessment
(Presentation of Demand and Report of Assessment)		Restoration Planning Phase: Restoration Plan
Post-Assessment Phase: Restoration Plan		(Presentation of Demand)
	D. Damages Recovery (Negotiated Settlement, Litigation/Award, etc.), and Restoration Implementation	Restoration Implementation Phase

A. Determination of whether to pursue an NRDAR: When the incident occurs (or may occur), and injury is detected or may potentially occur, preassessment activities involve reviewing readily available information (e.g., U.S. Environmental Protection Agency (EPA) remedial investigations on Superfund sites, U.S. Coast Guard (USCG) incident reports, and Service files) and collecting ephemeral data to determine if it is likely that natural resources or their associated services have been, or may be, injured, lost, or destroyed. This is when we also determine if other criteria specific to CERCLA, OPA, or CWA (see [43 CFR 11.23](#) and [15 CFR 990.41](#)) have been met, and whether any liability exemptions apply. Employees should:

- (1) Coordinate and cooperate with response agencies to ensure NRDAR activities do not interfere with response actions and to share data, streamline short-lived (ephemeral) data collection, and share personnel, equipment, and other resources when feasible and appropriate;
- (2) Work with Solicitors and Economists within the Department, other bureaus in the Department, and co-trustees to ensure claims are defensible and duplication of effort is avoided; and
- (3) Request designation of an Authorized Official (AO) from the Department's Office of Restoration and Damage Assessment (ORDA).

B. Assessment Plan: The CERCLA NRDAR regulations provide for a discrete injury assessment plan phase, which includes development of a draft Assessment Plan that must be publicly reviewed and finalized before the planned injury assessment activities can begin. In contrast, the OPA NRDAR regulations do not require a publicly reviewed Assessment Plan before injury assessment activities can begin.

(1) However, the National Pollution Fund Center (NPFC) requires that, for an agency to get funds from the Oil Spill Liability Trust Fund (OSLTF), an injury Assessment Plan must be:

- (a) Presented to the responsible party for a period of 90 days, and
- (b) Made available to the public for comment for 30 days.

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(2) In general, Assessment Plans explain the proposed methods we will use to assess injury. It is not a report describing actions that have been completed.

C. Injury Determination and Quantification and Damage Determination:

(1) Injury determination and quantification involves ascertaining whether a resource has been adversely affected by a discharge of oil or a release of a hazardous substance, and identifying the scale and magnitude of impacts to natural resources and natural resource services from that discharge/release. During this phase, we quantify injury, including, if applicable, losses over time, until adversely impacted natural resources and natural resource services are returned to pre-discharge or release condition.

(2) Damage determination activity involves identifying the type and amount of restoration needed to address the loss. We evaluate a reasonable range of restoration alternatives. We may also determine the costs of restoration, including the compensable value of the lost resource services over time. At the conclusion of the assessment activities, we issue a report of findings that documents the results of the NRDAR process with respect to quantifying natural resource injuries and identifying appropriate restoration. Following are the reports, which differ depending on the authority under which they are developed:

(a) *CERCLA*: The report of findings is called the “Report of Assessment,” which consists of many documents produced during the NRDAR, including the Restoration and Compensation Determination Plan (RCDP). The RCDP describes the injury determination, injury quantification, and damages quantification in detail. We make the draft RCDP available for public review and comment, and the final RCDP becomes the basis for the NRDAR claim. It can support a referral to the Department of Justice to file litigation to recover natural resource damages. While the RCDP evaluates restoration options and uses those options to develop the damages, it does not select the restoration options. Under *CERCLA*, a different document, the Restoration Plan—which should be largely based on the RCDP—is developed for the trustees to select restoration options to implement with recovered damages. This is different than OPA.

(b) *OPA*: The Restoration Plan (sometimes called a Damage Assessment and Restoration Plan) is developed at the conclusion of the Restoration Planning Phase. The Restoration Plan includes both a report of the assessment and a selection of restoration options that may be implemented. We make the draft Restoration Plan available for public review and comment, and the final Restoration Plan becomes the basis for the NRDAR claim and restoration implementation.

D. Damages Recovery and Restoration: The Service works with the Office of the Solicitor to present a claim for natural resource damages to the responsible party(ies) or the NPFC, to negotiate settlements, and, if necessary, to file any litigation against responsible party(ies) to recover natural resource damages.

(1) Claims for natural resource damages may include the costs of restoration implementation and reasonable costs of assessment. We provide information on cost documentation protocols in [573](#)

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FW 4. We may provide a Covenant Not to Sue (CNTS) as part of a settlement (see [section 3.8](#) below).

(2) After damages are recovered, trustees implement and oversee restoration projects using recovered funds in accordance with a publicly reviewed Restoration Plan, or the trustees may oversee the restoration implementation that the responsible party(ies) perform. We usually conduct restoration in partnership with co-trustees using Restoration Plans that are developed during the post-assessment phase under CERCLA, or the restoration planning phase under OPA.

COVENANTS NOT TO SUE

3.8 What is a Covenant Not to Sue (CNTS)? A CNTS is a legally binding agreement that provides assurance to a responsible party that there will be no future claims for natural resource damages against them for a specific release or incident(s), other than for specifically reserved exceptions, such as new information or unknown conditions.

3.9 What are the information standards related to settlements and CNTS? See the Departmental memorandum, "[Documentation for Natural Resource Damage Assessment and Restoration Settlements and Covenants Not to Sue](#)," dated May 7, 2004, for Departmental policy regarding documenting the decision process and decisions made to support a settlement recommendation. Settlements for natural resource damages should be supported with documentation for the basis of the recommendation, specifically how the terms and conditions constitute "appropriate action necessary to protect and restore the natural resources" injured.

A. Appropriate documentation includes information on the nature and extent of injury and how we calculated or estimated costs for assessment, lost use values, and restoration costs. Documentation should also include information on how the terms of the settlement meet restoration objectives.

B. The supporting information should be:

(1) Sufficient to provide a basis for dollar values or conditions in the covenant, and

(2) Based on sound science.

C. When a responsible party or parties will perform restoration implementation, we must include legally enforceable performance standards to ensure that restoration occurs. We include standards or thresholds for monitoring performance and describe the actions to take if the party or parties do not meet the standards/thresholds.

D. Unless there are extraordinary circumstances that the AO, Solicitor, or Department of Justice (DOJ) justifies in writing, settlements should include the reopener required by section 122(f)(6) of CERCLA. A reopener allows the Department to make a later claim if we discover certain new information or unknown conditions at a later date. The justification of extraordinary circumstances must explain how we met the conditions of CERCLA section 122(f)(6)(B). OPA claims do not require a reopener provision, although we may include one.

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3.10 What happens if a settlement cannot be reached? If settlement negotiations are not successful, the case manager may formally document the NRDAR claim and, in cooperation with the servicing Solicitor, develop a referral for litigation. That referral goes to the Office of the Solicitor for approval and then to the DOJ. The referral must assure that funding is available to support litigation efforts—a non-recoverable cost—before the Office of the Solicitor sends it to the DOJ. However, for NRDAR cases under OPA, the AO, working with co-trustees, may submit the claim to the NPFC rather than pursue litigation.

BANKRUPTCY

3.11 What happens if the responsible party files for bankruptcy? When there is a bankruptcy proceeding with an imminent deadline for submission of claims, we work with the Office of the Solicitor to establish injury and damages for the purposes of a bankruptcy claim.

ROLES AND RESPONSIBILITIES

3.12 Who is responsible for managing Service participation in NRDAR?

Table 3-2: Responsibilities for Managing Participation in NRDAR

These employees...	Are responsible for...
A. Regional Directors	<p>(1) Requesting designation to serve as the Departmental AO before participating in NRDAR negotiations, unless one has already been designated;</p> <p>(2) Exercising their delegated signature authority (see 521 DM 3);</p> <p>(3) Coordinating with any other affected bureaus and the Office of the Solicitor (see 521 DM 2);</p> <p>(4) Ensuring that Assistant Regional Directors, Regional NRDAR Coordinators, and case managers complete the activities in Table 3-1;</p> <p>(5) Communicating with the Department's Office of Restoration and Damage Assessment Director and the Service Director about NRDAR claims and settlements, as appropriate; and</p> <p>(6) Ensuring, in consultation with the Office of the Solicitor, that resources are available for the case team(s) to pursue litigation if settlement negotiations fail.</p>

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These employees...	Are responsible for...
B. National NRDAR Coordinator (in Ecological Services Branch of Environmental Response and Restoration)	<p>(1) Developing national NRDAR policy and advising Regional offices about its implementation;</p> <p>(2) Working with his/her counterparts in the Department, other bureaus, and other agencies to coordinate NRDAR policies;</p> <p>(3) Working with case managers and Regional Coordinators to resolve case issues needing coordination with the Department, other bureaus, or other agencies; and</p> <p>(4) Tracking Service involvement in NRDAR cases and maintaining national records, when appropriate.</p>
C. Assistant Regional Directors for Ecological Services	<p>(1) Reviewing claim development, including injury documentation and recommendations on claim resolution and settlements, granting CNTSSs, and litigation; and</p> <p>(2) Coordinating with their counterparts in other programs when Service lands have been impacted by a hazardous substance release or oil or chemical spill (see 561 FW 10, CERCLA Site Cleanup).</p>
D. Regional NRDAR Coordinators	<p>(1) Developing Regional NRDAR procedures and advising field offices about their implementation;</p> <p>(2) Coordinating with their counterparts in other Regions, agencies, and bureaus on NRDAR issues and claims, including response and remedial activities;</p> <p>(3) Working with case managers and the National NRDAR Coordinator to effectively coordinate with the other Regions, Office of the Solicitor, other bureaus and agencies, and co-trustees, as appropriate, when developing and negotiating natural resource damage claims and planning and implementing restoration projects;</p> <p>(4) Tracking Service involvement in NRDAR cases and maintaining Regional records, when appropriate;</p> <p>(5) Assisting the case managers to fulfill their responsibilities;</p> <p>(6) Ensure case managers coordinate natural resource damage assessments, emergency restoration projects, and settlement negotiations with remedial and response activities in a timely manner; and</p> <p>(7) Providing copies of NRDAR settlement documents to the National</p>

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These employees...	Are responsible for...
	NRDAR Coordinator and the Director of the Department's Office of Restoration and Damage Assessment.
E. Case Managers	<p>(1) Conducting the day-to-day case management activities, including the coordination of all the basic NRDAR steps we describe in this chapter;</p> <p>(2) Maintaining the administrative record indices for the NRDAR cases for which they are responsible;</p> <p>(3) Coordinating effectively with the Office of the Solicitor, other bureaus and agencies, and co-trustees, as appropriate, when developing and negotiating natural resource damage claims in their areas of responsibility;</p> <p>(4) Working with the Office of the Solicitor through the assessment process to develop a legally sound claim and strategy for claim resolution, including the development of a settlement position and a plan for securing resources to support litigation; and</p> <p>(5) Documenting participation in negotiations and settlements, maintaining documentation in the administrative record, and providing settlement documents to the Regional NRDAR Coordinator. For detailed information about our responsibilities for claim preparation and injury documentation, see the memorandum from the Department's NRDAR Program Manager to the Director, <u>"Documentation for Natural Resource Damage Assessment and Restoration Settlements and Covenants Not to Sue,"</u> May 7, 2004.</p>

/sgd/ James W. Kurth
DEPUTY DIRECTOR

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